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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 417

DAISY B. HORST, EXECUTRIX OF THE ESTATE OF E. CLEMENS HORST, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 43–46) is reported at 150 F. 2d 1. The opinion of the Tax Court (R. 25–26) is reported at 3 T. C. 417.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1945 (R. 47). A petition for rehearing was denied on August 2, 1945 (R. 48). The petition for a writ of certiorari was filed on September 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in holding that a transfer in 1925 by the decedent to his wife of 2,026 shares of stock which, under California law, was community property, constituted a taxable gift under Sections 319 and 320 of the Revenue Act of 1924.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 319 [as amended by Section 324 of the Revenue Act of 1926, c. 27, 44 Stat. 9]. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: * * *
>
> SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax im-

posed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 67, promulgated under the Revenue Act of 1924:

ARTICLE 1. *Transfers reached.*—At common law the term "gift" is applied only to voluntary transfers of property made without consideration or compensation therefor. But the taxing act with which these regulations deal employs the term "gift" in a wider and more comprehensive sense, for, while it embraces transactions which at common law amount to gifts, it goes further by including sales and exchanges for less than a fair consideration in money or money's worth. (See sec. 320.) Hence, the statute reaches and taxes all transfers of property made during the calendar year (other than the gifts specified in par. (3) of subdivision (a) and in par. (2) of subdivision (b) of sec. 321), to the extent that they are donative in character and exceed the authorized deductions.

* * * * *

A sale or exchange for a consideration reducible to a money value which is less than a fair consideration amounts to a gift, within the meaning of the statute, to the extent that the fair market value of the property, at the time of the transfer, exceeds the consideration received. If the consideration is not reducible to a money value it is to be wholly disregarded. A

transfer which is neither a sale nor an exchange does not involve a gift if there is a valid, even if not an adequate, consideration for the transfer.

* * * * *

Civil Code of California:

Section 161a: (effective July 29, 1927)

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 172a:

The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole

lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

STATEMENT

This case involves a deficiency in gift taxes under the Revenue Act of 1924 asserted against the estate of E. Clemens Horst, deceased. He and Daisy B. Horst, the petitioning executrix, were married in 1893, and from that time until his death they resided together as husband and wife in the State of California (R. 23).

On April 11, 1925, the decedent and his wife owned at least 4,052 shares of the capital stock of E. Clemens Horst Company, all of which constituted community property under the laws of the State of California (R. 23–24). On that date the decedent and his wife entered into an agreement, the terms of which were fully carried out, which provided as follows (R. 23–25):

> This Agreement, made this 11th day of April, 1925, by and between E. Clemens Horst and Daisy B. Horst, his wife, both of the City and County of San Francisco, State of California, witnesseth:
>
> That Whereas there now stands in the name of the undersigned, E. Clemens Horst, four thousand fifty-two (4052) shares of the capital stock of E. Clemens Horst Company, a New Jersey corporation, evidenced by certificates of stock Numbers 238 and 258 of said corporation; and
>
> Whereas, said corporate stock is the community property of the parties hereto and it is the desire of the parties hereto that said corporate stock should be equally divided between them so that each one shall hold one-half thereof as his or her separate property;
>
> Now, Therefore, It Is Hereby Agreed between the said parties as follows:
>
> First: Said E. Clemens Horst hereby assigns, transfers and conveys unto said Daisy B. Horst, two thousand twenty-six

(2026) shares of said capital stock to be held by her as her separate property;

Second: The said Daisy B. Horst hereby assigns, transfers and conveys to said E. Clemens Horst the remaining two thousand twenty-six (2026) shares of said capital stock to be held by him as his separate property with full and unrestricted ownership of the same, including full testamentary power over the same.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first herein written.

E. CLEMENS HORST
DAISY B. HORST.

No return was filed for gift tax because of the transfer until May 23, 1942 (R. 6, 16). At that time a return was filed by Mrs. Horst, acting as executrix for the estate of her deceased husband (R. 6, 16). On December 9, 1942, the Commissioner of Internal Revenue sent her a notice of deficiency in gift tax under the Revenue Act of 1924 (R. 12–15), and a petition for redetermination of that deficiency was filed with the Tax Court (R. 4–11). The original deficiency was based upon a value of $320 per share for the stock transferred to Mrs. Horst (R. 15), but at the trial before the Tax Court it was agreed that the value of the stock on the date of transfer was $200 per share (R. 19–20). The Tax Court sustained the Commissioner's determination (R. 25–26), and entered judgment for a reduced deficiency in

the sum of $9,708 (R. 27). Its decision was affirmed by the Circuit Court of Appeals (R. 43–46, 47).

ARGUMENT

It is submitted that the court below correctly held that the value of the 2,026 shares of capital stock of E. Clemens Horst Company which the decedent transferred to his wife in 1925 was taxable under the gift tax provisions of the Revenue Act of 1924. The decision below is not in conflict with any other decision. The question involved, insofar as petitioner relies on the construction of language used in Section 320 of the 1924 Act, *supra,* pp. 2–3, is not now of any general importance. Accordingly, we believe there is no ground which would justify the granting of a writ of certiorari in this case.

1. The transfer by decedent to his wife of the 2,026 shares of stock in E. Clemens Horst Company under the agreement set out above constituted a gift of such stock within the meaning of Section 319 of the 1924 Act, *supra,* p. 2, regardless of the release by her of her community interest, such as it was, in the remaining 2,026 shares covered by the agreement of April 11, 1925.

While the record does not show when the stock in question was acquired, it was admittedly acquired prior (Pet. 5) to the enactment of Section 161a of the California Civil Code (effective July 29, 1927) (*supra,* p. 4), and at the time of the transfer of the stock to his wife the husband con-

sequently was, for all practical purposes, sole owner of the stock, had complete management and control of the property, and was taxable upon any income realized from it. *United States* v. *Robbins,* 269 U. S. 315; *Hirsch* v. *United States,* 62 F. 2d 128 (C. C. A. 9th), certiorari denied, 289 U. S. 735. While the California courts recognized the wife's interest in community property acquired prior to July 29, 1927, as vaguely something more than a mere expectancy (*Stewart* v. *Stewart,* 199 Cal. 318, 342; *Trimble* v. *Trimble,* 219 Cal. 340; *Travelers Ins. Co.* v. *Fancher,* 219 Cal. 351; *Moore* v. *Neighbours,* 95 Cal. App. 628), she had no rights of ownership (*McKay* v. *Lauriston,* 204 Cal. 557; *Hirsch* v. *United States, supra*). Under California law the husband could, and in this case did, make a gift of such community property to his wife as her separate property. The gift in such a case is a gift of the entire property. *Gillis* v. *Welch,* 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722; see also *Kaltschmidt* v. *Weber,* 145 Cal. 596; *Logan* v. *Thorne,* 205 Cal 26; *Ballinger* v. *Ballinger,* 9 Cal. 2d 330.

Of particular application here is the decision in *Gillis* v. *Welch, supra,* where the husband made a gift to his wife of community property acquired prior to 1927 without any corresponding release by the wife of her community interest in other property. The court recognized that the husband could not give to the wife more than he had, and the only question was whether

the full value of the community property was subject to the gift tax without any reduction for the value of the wife's community interest. The court pointed out that the wife's interest or estate in community property under the laws of California did not materialize until dissolution of the community by death or divorce. At the time of the gift, as here, she had no estate or interest in the community property, and the full value was, therefore, held taxable as a gift by the husband. To the same effect is *Fish* v. *Helvering*, 75 F. 2d 769 (App. D. C.).

The fact that the decedent transferred one-half of the community property involved to his wife in an instrument which also contained her release or waiver of her community interest with respect to the other half of the property does not alter the legal effect of the transaction as a gift within the meaning of Section 319 of the Revenue Act of 1924. Compare *Ballinger* v. *Ballinger*, 9 Cal. 2d 330. The conversion of the property into separate property in the *Gillis* case necessarily involved a termination of whatever community rights the wife had in the property. Nevertheless it was recognized that the taxpayer had given the entire property to her and that in measuring the gift no deduction from the total value of the property was to be made for her community interest.

2. Even if the transfer to the decedent's wife under the agreement of April 11, 1925, be con-

sidered a sale or exchange under Section 320 of the Revenue Act of 1924, the full value of the property transferred to the wife is subject to the gift tax and the decision below should be affirmed. As a gift, the transfer was completed, and was binding on the husband. If treated as a transfer in consideration of the wife's relinquishment of her community interest in the remainder of the stock, the consideration no doubt would be sufficient under state law to make the contract binding. Compare *Taft* v. *Commissioner,* 304 U. S. 351. But it does not mean, as petitioner maintains (Pet. 11–15), that it constituted "fair consideration in money or money's worth" within Section 320. The decisions cited above, and numerous other California cases, show that the interest of the wife in community property under California law, at least prior to the 1927 enactment of Section 161a of the California Civil Code (*supra,* p. 4), could not be reduced to terms of money or money's worth. Compare *Gillis* v. *Welch,* 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. Petitioner quotes from *Estate of Brix,* 181 Cal. 667, to show the "substantial value of the wife's rights, powers and privileges with respect to such community property" (Pet. 10–11), but that case differs radically from the instant case. There the court said (p. 676) that the rights of the wife in relation to the community property "*may* constitute a valuable and, *according to the*

circumstances of the case, an adequate consideration for the transfer" [italics supplied], for purposes of the state inheritance tax law. The finding of the trial court in that case that the consideration was "adequate and valuable" within the meaning of the state inheritance tax law was sustained because, as the court pointed out (p. 677):

> The agreement, pursuant to which the transfer in question was made, amounted to more than a mere surrender by the wife of her interest in the community property. It was a complete alteration of the property relations between the parties, as authorized by section 159 of the Civil Code. Taking all the various documents together, they constituted an entire transaction by which the decedent and his wife provided for her support, divided their property interests and settled and released all claims which either might or could have in the property of the other. The wife also thereby gave up the right which she would have by law to support out of her husband's property, other than that provided by the agreement, and her rights to alimony, costs, and attorney's fees in any divorce suit or separate maintenance or other suit between them.

No such agreement was made or contemplated in this case. By the agreement of April 11, 1925 (*supra,* pp. 6–7) the wife merely waived her community interest in certain shares of stock, which interest is not shown to have had any value deter-

minable in terms of money or money's worth, as required by Section 320 of the 1924 Act.

Petitioner insists that the decision below is based upon the gift tax provisions of the Revenue Act of 1932, c. 209, 47 Stat. 169, rather than under the applicable provisions of the 1924 Act (Pet. 2, 7–9). The basis of this argument seems to be the court's reliance upon the decisions of this Court in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, and the court's quotation of the words "for an adequate and fair consideration in money or money's worth" in its opinion (R. 45). There is no basis for this argument. Section 320 of the 1924 Act is quoted in a footnote to the court's opinion as the applicable statute, and the decision is based upon the fact that under California law the wife "had no vested interest" in the community property at the time of the transfer, that the decedent owned "the entire holding of stock", and that by the agreement of April 11, 1925, he "merely gave one-half of his stock to his wife" (R. 44). The court therefore properly held that the above decisions of this Court are controlling.

3. Clearly there is no conflict here with the decision of this Court in *Merrill* v. *Fahs,* 324 U. S. 308, as alleged by petitioner (Pet. 13). Petitioner's view seems to be that the decision in the *Merrill* case holds that a different quantum of consideration was contemplated by Section 320

of the 1924 Act, which used the term "fair consideraion in money or money's worth", than was contemplated by Section 503 of the 1932 Act which used the term "adequate and full consideration in money or money's worth." In so arguing, the petitioner overlooks the fact that under either Act the consideration is to be measured in "money or money's worth," which has not been done and cannot be done in this case. Furthermore, it is clear from the legislative history of this provision, and this Court's decisions in *Taft* v. *Commissioner,* 304 U. S. 351, and *Merrill* v. *Fahs, supra,* that the more specific language of the later Act was adopted to forestall a possible interpretation of the 1924 Act such as that contended for here.

Petitioner also asserts conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Ferguson* v. *Dickson,* 300 Fed. 961, certiorari denied, 266 U. S. 628, and *McCaughn* v. *Carver,* 19 F. 2d 126 (Pet. 13–14). Although those cases arose under estate tax provisions employing similar language, they dealt with dower rights and statutory rights in lieu of dower, rather than with the community interest of the wife under California law. Furthermore, if those cases can be considered as authority for the construction petitioner advances, they would seem to have been overruled by the decisions of this Court in *Taft* v. *Commissioner, supra,* and *Merrill* v. *Fahs, supra.*

4. Finally, the issue here involved is not of sufficient general importance to justify review by this Court. It arises under the gift tax provisions of the Revenue Act of 1924, which were effective only through the year 1925, and the only case which could arise under that Act in the future would be one like the instant case where no gift tax return was filed and the statute of limitations on assessment therefore had not run.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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